IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3337 OF 1996
WITH
WRIT PETITION NO.3552 OF 1996
WITH
CIVIL APPLICATION NO.1017 OF 2004
WITH
CIVIL APPLICATION NO.167 OF 1998
WITH
CIVIL APPLICATION NO.4140 OF 1996

Amratlal Valji
(since deceased)
Hemant Amratlal Valji & anr. ..Petitioners.

Vs.

Dr. G.S. Shah ..Respondent.

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Mr. A.G. Damle for the Petitioners.
Mr. A.K. Abhyankar, Senior Advocate instructed by Mr. Nitin Mhatre for Respondent No.1.

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CORAM: DR. D.Y. CHANDRACHUD, J.

12th June, 2006.

ORAL ORDER:

1. The Small Causes Court tried two suits. The first was a suit instituted by the Petitioner in December 1973 claiming a declaration of tenancy. The second was a suit instituted by the Respondent in March 1979 for possession, under Section 41 of the Presidency Small Causes Courts Act, 1882. The suit instituted by

the Respondent was decreed. The suit instituted by the Petitioner came to be dismissed. The judgment and order of the Trial Judge was delivered in November 1991 and was confirmed in appeal by the Appellate Bench of the Small Causes Court on 17th April, 1996. These petitions under Article 227 impugn the correctness of the judgment of the Appellate Bench. The two writ petitions arise out of the proceedings in the declaratory suit on the one hand and the suit for eviction on the other.

2. The premises in the present case comprise of Flat No.5 situated on the first floor of a building known as Sagar Mahal at Walkeshwar Road, Mumbai 400 006. The First Respondent is a medical doctor and was at the material time in the service of the Central Railways as an Assistant Medical Officer. On 1st December, 1972, an agreement styled as a caretaker agreement was entered into between the First Respondent and the predecessor-in-interest and father of the Petitioners, Amratlal Valji who expired during the pendency of these proceedings. Under the agreement a licence was granted to Amratlal Valji to reside in the premises for a term of six months. The execution of the agreement has not been disputed. By Maharashtra Act 17 of 1973 the

provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 were amended inter alia to incorporate by Section 15A a protection to licensees who were in occupation of premises on 1st February, 1973. Amratlal Valji instituted a declaratory suit on 20th December, 1973 in the Small Causes Court. The First Respondent instituted a suit for eviction under Section 41 of the Presidency Small Causes Court Act, 1882 on 15th March, 1979. Evidence was adduced in common. The Trial Judge dismissed the declaratory suit and decreed the suit for eviction instituted by the First Respondent. That order was confirmed by the Appellate Bench of the Small Causes Court.

3. In assailing the correctness of the judgment and order of the Appellate Bench, two submissions have been urged before the Court on behalf of the Petitioner; (i) Though the agreement dated 1st December, 1972 is styled as a caretaker agreement and purports to confer no more than a licence to the Petitioner to occupy the premises for a period of six months, in substance the intention of the parties was to create a tenancy. While the agreement of 1st December, 1972 was in fact executed by the Petitioner, both the Courts have erred in rejecting the contention of

the Petitioner that it was obtained by fraud or misrepresentation; (ii) The Petitioner was in occupation of the premises under a licence which subsisted on 1st February, 1973 and upon the enactment of Maharashtra Act 17 of 1973 he attained the status of a tenant as envisaged by law. Both these submissions fall for consideration before the Court.

4. The first submission first. The Court must, when an issue of the present nature arises have regard to the substance of the transaction between the parties. The substance of the transaction has to be assessed with reference to the documentary material principally consisting, as it does, of the written agreement between the parties. When the terms of the agreement are unclear the real intention of the parties has to be determined with reference to all the surrounding circumstances and it is a trite principle of law that mere labels which parties assign to the contract between them are not of determinative significance.

5. The leading authorities on the subject include **Associated Hotels of India Ltd. v. R.N. Kapoor**[1], **Sohan Lal**

1 AIR 1959 SC 1262 : (1960) 1 SCR 368.

Naraindas v. Laxmidas Raghunath Gadit[2]**, Capt. B. V. D'Souza v. Antonio Fausto Fernandes**[3]**, Tulsi v. Paro**[4]**, Delta International Ltd. v. Shyam Sundar Ganeriwalla**[5] and **C.M. Beena v. P.N. Ramachandra Rao**[6]**.**

6. In **Delta** (supra) the Supreme Court enunciated the principles which emerge from the decided cases. The first three propositions are material for the present case and are as follows :

> "(1) To find out whether the document creates a lease or a licence the real test is to find out "the intention of the parties"; keeping in mind that in cases where exclusive possession is given, the line between a lease and a licence is very thin.
>
> (2) The intention of the parties is to be gathered from the document itself. Mainly, the intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that the document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.
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> (3) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the intention is to be gathered

2 1971 Bom. L.R. 144.
3 (1989) 3 SCC 574.
4 (1997) 2 SCC 706.
5 (1999) 4 SCC 545.
6 (2004) 3 SCC 595.

> from the other evidence which may be available on record, and in such cases exclusive possession of the property would be the most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease."

In the more recent decision in **C.M. Beena**, the Supreme Court observed thus :

> "Generally speaking, the difference between a "lease" and "licence" is to be determined by finding out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful."

7. In the present case, the execution of the agreement has not been in dispute, nor is it disputed before this Court. The agreement, which was marked in evidence, recites that the original Petitioner had requested the First Respondent to allow him the use of a portion of the premises for a period of six months, since there was a marriage in the family, on a caretaker basis. The

Petitioner agreed to vacate the premises on the expiry of the term of the agreement and in the meantime agreed to pay compensation at the rate of Rs.850/- per month. The agreement recited that (i) no other person other than a member of the family would be permitted to occupy the premises; (ii) no changes or alterations either of a permanent or temporary nature would be made to the premises; (iii) no telephone connection either temporary or permanent would be obtained and (iv) the caretaker would hand back possession within two days if the Co-operative Society objected to his occupation. The Appellate Bench has adverted to these conditions in a considerable degree of detail and has held that restrictive conditions of the kind which the agreement incorporated could not be associated with an agreement of tenancy. The Appellate Bench has had due regard to all the material conditions of the agreement. The construction placed by the Small Causes Court on the terms of the agreement cannot be regarded as perverse, or for that matter, as suffering from any error apparent on the face of the record. The parties were associated in an arms length transaction. Neither of them could have been oblivious of their rights or to the ways of the commercial world. The execution of the agreement has not been disputed. The terms

contained in the agreement clearly reflect that the real nature of the transaction between the parties and its substance was not the creation of a leasehold interest or an interest in the nature of a tenancy. The agreement did not confer or create any interest in immovable property, but conferred a bare right of occupation as a licensee confined to the duration of the licence.

8. The finding of the Small Causes Court both at the Trial and at the Appellate stage in regard to the nature of the agreement finds corroboration in the surrounding circumstances. The first is that the Co-operative Society had instituted a suit in the Co-operative Court before the litigation between the parties to these proceedings had commenced. A written statement was filed by the Original Petitioner which he produced in the course of his deposition. It may be noted that in the course of his written statement he specifically set up the case that he was claiming as a protected licensee and not on the basis of a tenancy. In other words, the specific defence of the Petitioner there was that he was originally inducted into the premises as a licensee and that his status as a licensee had then found statutory protection. The second important circumstance is the absence of any cogent

evidence that will support the case of fraud or misrepresentation. The Appellate Bench of the Small Causes Court was justified in relying on the absence of such evidence. Finally, the Appellate Bench also had due regard to the fact that an effort was made in the course of the evidence to improve upon the case that was set out in the pleadings. In the course of the evidence, the Petitioner deposed that the premises had been taken at Rs.75,000/-; that the broker informed him that an amount between Rs.10,000 and 15,000/- would have to be spent for renovation and that the aforesaid amount was spent. Besides this, the Appellate Bench noted that there was no evidence to show that the payment of Rs.75,000/- was made or for any expenditure on account of renovation. The totality of the circumstances of the case therefore clearly militates against the acceptance of the submission of the Petitioner that the real nature of the transaction between the parties was a transaction of tenancy. The finding arrived at by the Courts below therefore does not suffer from any error of a nature that would require the invocation of the supervisory jurisdiction under Article 227.

9. In so far as the second submission is concerned, it would

be necessary to advert to the relevant provisions of law. Section 15A which was introduced by Maharashtra Act 17 of 1973 provides as follows :

> "15A. (1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purposes of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.
> (2) The provisions of sub-section (1) shall not affect in any manner the operation of sub-section (1) of section 15 after the date aforesaid."

10. Now **ex facie** reading the provision as it stands and without adding or detracting anything therefrom, the statute by a deeming fiction confers the status of a tenant on licensees who were in occupation of any premises on 1st February, 1973, where the premises consisted of not less than a room. The protection is conferred on a licensee and that expression is defined in Section 5 (4A) as follows :

> "(4A) "licensee", in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge; and includes any person in such occupation of any premises or part thereof in a building vesting in or leased to a co-operative housing society registered or

> deemed to be registered under the Maharashtra Co-operative Societies Act, 1960; but does not include a paying guest, a member of family residing together, a person in the service or employment of the licensor, or a person conducting a running business belonging to the licensor, [or a person having any accommodation for rendering or carrying on medical or para-medical services or activities in or near a nursing home, hospital or sanatorium,] or a person having any accommodation in a hotel, lodging house, hostel, guest house, club, nursing home, hospital, sanatorium, *dharmashala*, home for widows, orphans or like premises, marriage or public hall or like premises, or in a place of amusement or entertainment or like institution, or in any premises belonging to or held by an employee or his spouse who on account of the exigencies of service or provision of a residence attached to his or her post or office is temporarily not occupying the premises, provided that he or she charges licence fee or charge for such premises of the employee or spouse not exceeding the standard rent and permitted increases for such premises, and any additional sum for services supplied with such premises, or a person having accommodation in any premises or part thereof for conducting a canteen, creche, dispensary or other services as amenities by any undertaking or institution; and the expressions "licence", "licensor" and "premises given on licence" shall be construed according;]" (emphasis supplied)

11. The statute has enacted a comprehensive definition of the expression "licensee" which can be divided for convenience of exposition in three parts. The first part of the definition enacts what the expression "means". The second part expands upon the ambit of the expression by the use of the words "includes". Finally,

the third part carves out exceptions by enacting that certain stipulated categories of persons would not fall within the ambit of the definition. In order to be a licensee a person has to be in occupation of premises under a subsisting agreement of licence for a licence fee or charge. For the purposes of the present case, what is material is the third part of the definition which specifically enacts that the expression 'licensee' shall not include certain categories. The first part of the excluded categories comprises of a paying guest, a member of the family residing together, a person in the service or employment of the licensor and a person conducting business belonging to the licensor. The next category of exclusion deals with persons having accommodation of a stipulated kind or nature, such as accommodation for rendering medical or para-medical services. In the present case, the Court is concerned with that part of the excluded category which deals with persons having accommodation "*in any premises belonging to or held by an employee or his spouse who on account of the exigencies of service or provision of a residence attached to his or her post or office is temporarily not occupying the premises*". The exclusion is subject to the condition that the licence fee or charge should not exceed the standard rent.

12. In order to consider whether this exclusion is attracted, it would be necessary to cull out the material part of the evidence which has emerged from the record. The First Respondent was between 6th October, 1970 and 11th October, 1973 attached with the Central Railways as an Assistant Medical Officer (Surgeon) and was posted at Kalyan. During the course of the trial it has emerged from the evidence that the First Respondent had been allotted service quarters at Kalyan before he entered into an agreement with the Petitioner on 1st December, 1972. Exh. 27 in the evidence was the certificate issued by the Chief Personnel Officer of Central Railways which certified that the First Respondent worked as Assistant Medical Officer (Surgeon) on a temporary basis from 6th October, 1970 to 11th October, 1973 at the Kalyan Hospital of the Central Railways. The certificate stated that due to the nature of his duties as Assistant Medical Officer (Surgeon) during his service the First Respondent was required to reside in earmarked Railway quarters at Kalyan attached to that Post. This was corroborated by the evidence of two witnesses who were examined in support of the case of the First Respondent. The first was Dr. K.B. Pillai, a retired railway servant. The second was Shri. Pednekar who held the post of Chief Medical Officer between

1972 and 1974. The evidence of these two witnesses clearly establishes that during the course of the First Respondent's posting at Kalyan Hospital as an Assistant Medical Officer (Surgeon), he had been allotted railway quarters which were earmarked for the post. This evidence as noted by the Appellate Bench of the Small Causes Court has gone unchallenged in the course of cross examination.

13. The evidence on the record clearly establishes that the First Respondent was a person who was temporarily not occupying the premises that form the subject matter of this dispute on account of the exigencies of service or by the provision of a residence attached to his post or office. The Petitioner is hence clearly a person having accommodation in any premises belonging to or held by an employee who on account of the exigencies of service or provision of a residence attached to his post or office is temporarily not occupying the premises, within the meaning of those words in clause (4A) of Section 5 of the Act. In that view of the matter, the Petitioner was not a licensee as defined in clause (4A) of Section 5 since his case was carved out by virtue of the exclusionary clause therein. Not being a licensee as defined in

Section 5(4A), the Petitioner was not entitled to protection conferred upon licensees by Section 15A of the Act as amended by Maharashtra Act 17 of 1973.

14. On behalf of the Petitioner it has been submitted that Section 5(4A) defines the expression 'licensee' but not the expression 'licensor'. The submission, however, would not carry the case of the Petitioner any further because the protection that is conferred by sub section (1) of Section 15A is on a licensee. Unless a person is a licensee as on 1st February, 1973, in occupation of any premises not less than a room, he would not be entitled to the benefit of the deeming fiction created by the statute of being regarded as a tenant of the landlord. Maharashtra Act 17 of 1973 amended the provisions of the Rent Act in several respects. Section 13(1)(e) was amended so as to provide a ground for eviction where the tenant had after the commencement of the Amending Act of 1973 unlawfully given on licence the whole or any part of the premises or assigned or transferred his interest therein. Section 14(2) of the Act as amended provides that where the interest of a licensor who is a tenant of any premises is determined, the licensee who by Section 15A is deemed to be a

tenant, shall be deemed to become a tenant of the landlord, on the terms and conditions of the agreement consistent with the provision of the Act. The protection of Section 15A is a protection which can be availed of by a licensee, a licensee being one as defined in Section 5(4A). There is nothing in the subject or context of Section 15A that is repugnant to the definition contained in Clause (4A) of Section 5. The Petitioner was inducted for a temporary period during which the First Respondent was allotted service quarters by the Central Railways. The Petitioner was not a licensee within the meaning of Section 5(4A) and was therefore not a protected licensee.

15. For all these reasons, I am of the view that the concurrent findings that have been arrived at by the Courts below do not warrant any interference by this Court in the exercise of the supervisory jurisdiction under Article 227. The findings are borne out by the evidence on the record and are consistent with the legal position. The Petition shall accordingly stand dismissed. In the circumstances, there shall be no order as to costs. However, in order to enable the Petitioner to seek recourse to the remedies in appeal against this judgment and order, there shall be a direction

to the effect that the decree for eviction shall not be executed for a period of six weeks from today, subject to the filing of the usual undertaking: The undertaking shall be filed in two weeks. The stay which has been granted shall be subject to the condition that all the arrears on account of licence fee and society charges at the contractual rate shall be paid within a period of two weeks from today. R & P may be returned.

16. In view of the dismissal of the Petitions, the Civil Applications become infructous and stand disposed of.